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No. 87-103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PIERRE BOULEZ,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER PIERRE BOULEZ

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COMMISSIONER OF INTERNAL REVENUE,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER PIERRE BOULEZ

ARGUMENT

1. The Commissioner suggests that the Regulation involved here is valid unless found to be "unreasonable or plainly inconsistent with the statute" (Opp. Br. at p. 5).[1] In support of this proposition, the Commissioner cites *Commissioner v. Portland Cement Co.*, 450 U.S. 156 (1981) and *National Muffler Dealers Ass'n. v. United States*, 440 U.S. 472 (1979). Neither of these cases, however, applies on the stipulated facts.

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1 References to "Opp. Br." are to the Commissioner's Brief in Opposition to the Petition, dated September, 1987

In *Portland Cement*, respondent taxpayer did not contend that the treasury regulations there at issue either were unreasonable on their face or inconsistent with the Internal Revenue Code: "To the contrary, [taxpayer] acknowledges that several courts have found the regulations to prescribe a reasonable formula for determining gross income. . . ." *Portland Cement*, 450 U.S. at 170. Nor do the guidelines suggested in *National Muffler Dealers* provide the Commissioner with any assistance in arguing that his interpretation of Treas. Reg. Sec. 301.7122-1 carries out in a proper manner the congressional mandate of I.R.C. Section 7122. In *National Muffler Dealers*, this Court observed that to make such a determination:

> we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it . . . and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

440 U.S. at 477 (citations omitted).

In the instant case, the plain language of I.R.C. Section 7122(a) omits any requirement of a writing. The Circuit Court has expressly concluded that "[u]n-deniably Section 7122 is facially ambiguous". (Op. at p. 8) After reviewing the available legislative history (including the portions recited in the opposing brief which the Commissioner has submitted to this Court), the Circuit Court concluded that it has found "no

suggestion that Congress, in the course of deliberation, otherwise considered the form that compromise agreements should take. . . ." (Op. at p. 8) Indeed, the Circuit Court expressly observed that the legislative history relied upon by the Commissioner to suggest a requirement of a writing refers to language which was *deleted* from the final draft of the original provision of Section 7122(a) (Op. at p. 7, n. 30 and pp. 7-8.) Where a provision of a bill is deleted by a congressional committee, such action "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Paving Co.*, 419 U.S. 186, 200 (1974).

The Circuit Court already has rejected the Commissioner's reliance upon this Court's decision in *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929) ("*Botany Mills*"). In concluding that the question posed in the instant case is one of "first impression", the Circuit Court reviewed *Botany Mills* and observed that this Court's decision in that case "did not address . . . the validity of oral compromise agreements per se" (Op. at p. 6, n. 28).[2]

The Commissioner observes that Section 7122 provides for a written record of a compromise to be placed in the Secretary's files. Based upon that observation, the Commissioner suggests that "the writing requirement set forth in the regulation plainly is not inconsistent with Section 7122" (Opp. Br. at p.5). The Commissioner's suggestion, however, is not

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2 The Commissioner's quotation from *Botany Mills* confirms that the focus of the Court in that case was the use of informal action by "subordinate officials" to reach a settlement (Opp. Br. at p. 6) and not action by a statutory delegate of the Secretary, such as the Director of International Operations.

relevant to the issue presented: Whether a *mandatory* writing requirement in the Regulation would be inconsistent with Section 7122. The Commissioner has failed to rebut *Hamilton v. United States*, 324 F.2d 960, 965 (Ct. Cl. 1963) in which the Court of Claims expressly confirmed that the sole writing referred to in Section 7122 (appearing in subsection b) is directory in nature. In light of *Hamilton*, to reconcile the Regulation with the Statute, one must conclude that the writing referred to in the Regulation is directory in nature.

The Commissioner asserts that Petitioner is "fanciful" in suggesting that the decision below conflicts with the doctrine of *General Electric Co. v. Southern Constr. Co.*, 383 F.2d 135 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). The Commissioner observes that *General Electric* involves a statute which is different from that presented to this Court. His distinction, however, ignores the purpose of Petitioner's citation: to show that in a case of "first impression", the Circuit Court has construed the statute at issue in a manner conflicting with fundamental principles of statutory construction which apply in other circuits.

This Court previously has held that conflicts in principle may provide the basis for an important question to be heard on a petition of certiorari to this Court. *See, e.g., Ivan Allen Co. v. United States*, 422 U.S. 617, 623-624 (1975). Petitioner respectfully submits that it is the Commissioner whose response is "fanciful": in a matter of "first impression", conflict between or among the circuits necessarily are conflicts in principle. Were this Court to ignore such conflicts, novel issues rarely, if ever, could be accorded certiorari treatment, regardless of the importance of the question presented -- and we note that the Commissioner does not dispute the importance of the question presented by the instant petition.

The Commissioner suggests that the language in *General Electric* is "dicta" (Opp. Br. 7).[3] Petitioner observes that *General Electric* recites a proposition which is ingrained in the precedent of other circuits. Thus, in *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977), the Court explicitly relied upon the observations of the Fifth Circuit in *General Electric* to compare adjacent provisions in a statute to determine the significance of the omission of a provision in one of two sections:

> As observed in *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 n. 4 (5th Cir. 1967), 'where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed.'

551 F.2d at 928

Thus, even were one to conclude that the language recited above technically was not part of the *General Electric* holding, clearly the identical language is part of the holding in *Richerson*. Accordingly, the holding of the Circuit Court in the instant case is in conflict with the canons of construction applied in the Third Circuit.

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3 The Fifth Circuit chose not to apply the rule of *pari materia* after concluding that the statute itself was free from ambiguity and doubt. 383 F.2d at 138 and n. 3. The Fifth Circuit expressly stated: "We do not mean to imply that our interpretation of Subdivision (b) would be different if it were construed in the light of its legislative history and in *pari materia* with Subdivision (a)." 383 F.2d at 138, n. 4.

2. The Commissioner's opposing brief (at p. 8, n. 6) fails to refute the implicit proposition for which the Commissioner himself cited *United States v. Memphis Cotton Oil Company*, 288 U.S. 62 (1933) to the Circuit Court (see Appendix H to Petition at pp. 61a-62a) and fails to refute the explicit proposition for which *Memphis Cotton* is cited in the Petition (at p. 12): Part 301 Regulations are directory and not mandatory. Regarding *Cleveland Trust Co. v. United States*, 421 F.2d 475 (6th Cir.), *cert denied.*, 400 U.S. 819 (1970), the Circuit Court expressly found that "the above quoted Revenue Procedure is directory and not mandatory." *Id.* at 481.

3. The Commissioner does not address *Chevron Oil v. Huson*, 404 U.S. 97, 106-107 (1971). In focusing solely upon the Regulations (Opp. Br. at p. 9), the Commissioner ignores the central role of I.R.C. Section 7122 in this litigation, as well as the express finding of the Circuit Court that the issue presented is one of "first impression" (Op. at p. 6) requiring interpretation of an "ambiguous" section of the Internal Revenue Code (Op. at p. 7). As such, the instant case falls squarely within the *Chevron* bar of retroactive application of "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106-107.

CONCLUSION

For the foregoing reasons, and for the further reasons set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

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